Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1000

JAMES E. FIFE - - - - - - - **Petitioner**

versus

UNITED STATES OF AMERICA - - **Respondent**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

JOHN TIM McCALL
835 West Jefferson Street
Louisville, Kentucky 40202
Counsel for Petitioner
Member of the Bar of the Supreme Court of the United States

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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IN THE

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No. _____

JAMES E. FIFE - - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals was entered on December 21, 1976. This decision will not be published. A copy of that opinion is presented to the Court in Appendix A, attached hereto.

JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was rendered and entered on December 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

A. Whether the Petitioner's Sixth Amendment Right to Confrontation Was Violated by the Court's Refusal to Allow Petitioner to Adequately Cross-Examine the Prosecution's Witness, Joseph Laverich.

B. Whether It Was Prejudicial Error for the Trial Court To Admit Into Evidence a Signature Card From a Bank Without Pretrial Discovery by the Defendant, In Spite of a Court Order Directing Discovery Pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure.

C. Whether Petitioner Was Denied His Right to a Fair Trial Guaranteed by the Fifth Amendment to the United States Constitution When the Trial Court Accepted a Co-Defendant's Guilty Plea During Trial.

STATUTES INVOLVED

18 U.S.C. §1952, at page 482; 18 U.S.C. §1341 at page 425; 18 U.S.C. §371 at page 284; and 18 U.S.C. §2 at page 237. The verbatim language of these statutes is set forth in Appendix B, attached hereto.

STATEMENT OF THE CASE

On May 4, 1970, a building occupied by Marra Industries in which petitioner had a financial interest was damaged by fire. On April 28, 1975, petitioner and several others were charged in a fifteen (15) count indictment by a Federal Grand Jury with offenses amounting to racketeering and mail fraud conspiracies. The Honorable Rhodes Bratcher presided over the trial by jury in the United States District Court for the

Western District of Kentucky, which was held October 6 through October 17, 1975.

At trial, a witness against petitioner, Mr. Joseph Laverich, who had been granted total immunity, was excused from answering questions as to his motives for testifying as well as so common a question as his address.

The Government admitted into evidence a signature card which had not been made available to petitioner pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure. The trial court allowed the Government to circumvent the Rule and imposed no sanctions on the prosecution.

Finally, the trial court allowed a co-defendant, closely linked to petitioner, to plead guilty during trial and advised the jury of the plea, to the prejudice and over the objections of the petitioner.

The jury retired and found petitioner guilty as charged of eight (8) counts of the indictment and not guilty to seven (7) counts of the indictment. On October 24, 1975, judgment and commitment was entered ordering petitioner to serve five (5) years on all eight (8) counts, with seven (7) of the sentences to run concurrently and one (1) to run consecutively with the others. Notice of Appeal was filed on October 24, 1975. On December 21, 1976, the Sixth Circuit Court of Appeals filed an opinion affirming the conviction (Appendix A).

REASONS FOR GRANTING THE WRIT

A. Petitioner's Sixth Amendment Right to Confrontation Was Violated by the Court's Refusal to Allow Petitioner to Adequately Cross-Examine the Prosecution's Witness, Joseph Laverich.

Joseph Laverich, who actually set the fire in this case, was called as a witness against petitioner. Before his testimony, Mr. Laverich was granted complete immunity from prosecution. On direct examination, Mr. Laverich admitted his role in the current case as well as his role in many other activities, including setting other fires and committing a number of burglaries.

Upon cross-examination, petitioner asked the witness his address. The Government objected to this question and the Court sustained that objection. This Court has stated many times in a number of cases, including *Alford* v. *United States,* 282 U. S. 687, 51 S. Ct. 218 75 L. Ed. 624 (1931); *Smith* v. *Illinois,* 390 U. S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968); *Pointer* v. *Texas,* 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1964), that the exclusion of cross-examination of a Government witness as to his residence, is prejudicial error. In *Smith, supra,* the Court stated that when credibility of a witness is in issue, the very starting point in exposing falsehood in bringing out the truth is asking his address in order to place the witness in his proper setting. In *Pointer, supra,* this Court held that to forbid this most rudimentary inquiry is to effectively emasculate the right of cross-examination. In *Brookhart* v. *Janis,* 384 U. S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d

314 (1965), this Court held that the denial of cross-examination is constitutional error of the first magnitude and no amount of showing of want of prejudice could cure it.

When the Government objected to the question, they stated that the question appeared to be "totally irrelevant and does nothing." *Alford, supra,* directly addressed this issue, however, and in that opinion the Court stated that "it is the essence of a fair trial that reasonable latitude be given the cross-examiner even though he is unable to state to the Court what facts the reasonable cross-examination might develop. Prejudice ensues from the denial of the opportunity to place the witness in his proper setting and to put the weight of his testimony and his credibility to a test without which the jury cannot fairly appraise them."

The Government alleged that the witness was apprehensive to tell his address, but gave no reasons why he should be apprehensive. Therefore, by excusing the witness from answering a very common and proper question, petitioner's right of confrontation was initially violated.

In the same cross-examination period, the petitioner attempted to ascertain a witness' motivation in testifying against petitioner. Again the Government objected, saying that there were no convictions involved with the other cases. However, this testimony is directly related to the immunity given in the present case. The very credibility of the witness was involved. Mr. Laverich was the most material witness against the petitioner and his testimony was extremely relevant to

the Government's generosity regarding future indictments. The jury deserved to know what type of person the witness was and exactly why he was motivated to testify in this matter.

When the reliability of a given witness may well be determinative of guilt or innocence of the accused, this type of evidence should be admitted. *Giglio* v. *United States,* 405 U. S. 150, 92 S. Ct. 963, 31 L. Ed. 2d 104 (1971). Petitioner understands that this type of cross-examination is in the Judge's discretion, however, in the circumstances surrounding the case, it is clear that the witness is getting something very substantial in return for his testimony. It is a fact that he received immunity for setting this fire in this particular case, but the cross-examination was attempting to discover any other deals that had been made about possibly more serious criminal activity. For these reasons, petitioner was denied his right to confront the witness through effective cross-examination to establish the interest of the witness involved.

B. It Was Prejudicial Error to Admit Into Evidence a Signature Card from a Bank Without Pretrial Discovery by the Defense, In Spite of a Court Order Directing Discovery Pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure.

Prior to trial, petitioner made a Rule 16 motion for discovery, including the items allowed under Rule 16(b), which covers the discovery of tangible evidence, including papers and documents. Petitioner had no reason to believe that the Government had not complied with the Court's Order to produce all documents. At trial, however, the Government called as a witness an official from a bank where the business that was involved here had an account. At that time the witness produced a signature card that the petitioner had signed. This card was not produced prior to trial. Petitioner immediately objected to the introduction of this evidence. The prosecution stated that they did not have the card, that the witness merely produced it at trial. However, the Government had subpoenaed the witness and directed him to bring certain records, including the signature card. At that point, the Court refused to admit the card into evidence, but the next day the Court did allow its introduction, over petitioner's objection.

Rule 16(b) delineates several sanctions for noncompliance. They include permitting discovery, granting a continuance or prohibiting introduction of the evidence in question. The Court did none of these things. It merely allowed the introduction of the card. The testimony of the witness did nothing to incriminate the petitioner, but the card itself was signed by the petitioner. Therefore, by looking at the card the jury might deduce that the petitioner was guilty by association through the testimony that the bank official gave about the card and another defendant, Ivan Marra, who pleaded guilty during trial.

Petitioner believes that the Government, by obtaining the card in the manner which it did, was purposely trying to circumvent the discovery order and Rule 16. The Government had introduced the testimony it de-

sired about the card, which did not refer to the petitioner, yet sought to introduce the card itself in order to incriminate the petitioner through physical evidence which they could not do through the bank official's testimony.

This Court has not addressed this issue in the past, however, some lower Courts have, and it appears to be a general rule that if the defendant requests a continuance or asks the Court not to allow the evidence to be admitted, and substantial rights of the accused are involved, then the evidence should not be admitted. *United States* v. *James,* (5th Cir., 1974), 495 F. 2d 434; *Good* v. *United States,* (5th Cir., 1969), 410 F. 2d 1217.

Petitioner asks this Court to determine what type of sanction ought to be imposed when the prosecution fails to comply with the discovery order. In the case at hand, no sanction was imposed and therefore it may be assumed that the Government may violate these rules at will.

C. Petitioner Was Denied His Right to a Fair Trial Guaranteed by the Fifth Amendment of the United States Constitution When the Trial Court Accepted a Co-Defendant's Guilty Plea During Trial.

When the trial began, there were three (3) defendants. Midway into the trial, one defendant, Ivan Marra, expressed his desire to plead guilty and that plea was accepted by the Court. Petitioner requested a continuance and a separate trial. That motion was overruled. At the time of the plea, the Court instructed the jury that no inference was to be made from the fact

of Mr. Marra's absence. Petitioner objected to this instruction. Later in the trial, Judge Bratcher determined that the jury must be advised of Mr. Marra's guilty plea. Petitioner requested limiting instructions and objected to the entire matter of advising the jury of the guilty plea. The Judge gave instructions to the jury at that point and petitioner moved for a mistrial which was overruled.

This Court has not established a test to be used as to whether or not a guilty plea of a co-defendant, made during trial, is prejudicial error to the defendant or defendants that remain in trial. Each Circuit has developed its own test. The Sixth Circuit in the past has used the aggravating circumstances test set out in *United States* v. *Kimbrew,* 380 F. 2d 538 (6th Cir., 1967). In using that test, the Court looked at all the aggravating circumstances to see if there was prejudicial error. The Sixth Circuit in *Kimbrew* used the decision in *Payton* v. *United States,* (D.C., Cir., 1955), 222 F. 2d 794, as one of its bases. In that case the Court held that the evidence showed a close association between the co-defendants and one's guilty plea prejudiced the other's right to be tried solely on the evidence. In *Kimbrew* the Court found that there was strong and clear evidence of the defendant's guilt and since the Judge had not been requested to give limiting instructions, there was no prejudicial error in allowing the co-defendant to plead guilty. In the present case, there was a minimal amount of proof against the petitioner and he was in fact acquitted of several counts of the indictment. Only one witness testified directly about

petitioner and that witness was an unindicted co-conspirator who had been granted immunity. Clearly, on the basis of *Payton* and *Kimbrew,* petitioner could not be left unprejudiced by Mr. Marra's guilty plea.

However, in the opinion on this case of the Sixth Circuit, the Court changed the test they use in determining prejudicial error in a situation such as this. It decided to use the Fifth Circuit's test in the *United States* v. *Baete,* 314 F. 2d 782 (1969). In that case the test is whether the corrective instructions are sufficient. Based on the decision in *Baete,* the Sixth Circuit determined that the instructions were sufficient and there was no prejudice to the petitioner.

Petitioner is left unclear about what test should be used to determine whether prejudice results from a guilty plea of a co-defendant during trial and petitioner requests that this Court adopt one of the tests of the Circuits involved.

As far as the issue as to whether any instructions given can effectively avoid prejudice in the jury's mind, petitioner would like to cite *Bruton* v. *United States,* 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), in which the Court considered whether or not instructions given to a jury to not consider a co-defendant's confession implicating the defendant were effective. In that case the Court said that they could not wipe away the prejudicial effects of the evidence. The Court stated "the Government should not have the windfall of having the jury being influenced by evidence against the defendant which as a matter of law they should not consider but which they cannot put out of their minds."

The Court further said that it was a naive assumption that prejudicial effects can be overcome by instructions to the jury. While *Bruton* dealt with the confession of a co-defendant, there does not seem to be a substantial difference in that case and the case in which a co-defendant pleads guilty during trial, especially when the co-defendants are very closely associated as in this case where they were business partners. "The risk that the jury will not or cannot follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton,* p. 135. It is impossible to determine whether or not petitioner's case was affected by Mr. Marra's guilty plea, but the hazard was so substantial that petitioner's request for a petition for writ of certiorari must be granted.

CONCLUSION

The reasons for granting the writ, set forth above, clearly enunciate substantial questions of federal and constitutional law. These issues have led to a great deal of confusion in the lower courts and should be settled by this Court. We urge this Court to grant certiorari to decide these questions.

Respectfully submitted,

JOHN TIM MCCALL
Counsel for Petitioner
Member of the Bar of the Supreme Court of the United States

APPENDIX

Not for Publication

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 76-1366
No. 76-1367

UNITED STATES OF AMERICA,
Appellee,
v.
JAMES E. FIFE and ALVIN KLEIN,
Appellants.

APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed December 21, 1976.

Before: PHILLIPS, Chief Judge; MCCREE and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. The appellants, Fife and Klein, were indicted by a grand jury of the Western District of Kentucky for conspiring to travel in interstate commerce for the purpose of committing arson and of conspiring to use the mails to defraud. They were also indicted in six substantive counts charging violations of 18 U.S.C. § 1952, interstate travel for the purpose of committing arson, and eight substantive counts of violating 18 U.S.C. § 1341, use of the mails to defraud. Both appellants were convicted of the

conspiracy charge and three substantive counts of interstate travel to commit arson as well as charges of mail fraud. A co-defendant, Ivan Marra, pled guilty during the trial to the conspiracy count and one substantive count of interstate travel to commit arson. Each appellant was sentenced to serve five years on count one, the conspiracy count, and five years on one of the substantive counts, to be served consecutively to the conspiracy sentence; each was sentenced to serve concurrent sentences on the remaining substantive counts.

A building in Louisville, Kentucky in which the appellant Klein had a financial interest burned on May 4, 1970. There was abundant evidence of arson. The building was insured against loss by fire by the Hartford Insurance Group, and Klein eventually received $160,000 from Hartford in settlement of the fire claim. The co-defendant Marra made a claim against Fireman's Fund Insurance Company for loss to the contents of the building under a policy he had obtained upon representation to Fireman's Fund that he was conducting a plastics business as lessee of the building. The evidence disclosed that Marra had moved some materials into the building to give the impression that a business was being conducted, but that actually this was not the case. Fireman's Fund never paid Marra on his claim. The arrangements for the fire and the actual setting thereof involved trips between Pennsylvania and Kentucky by the defendants and others acting in concert with them, and the mails were used in filing loss claims with the insurance companies. Neither appellant questions the sufficiency of the evidence.

Appeal of Alvin Klein (No. 76-1367)

Klein made a motion under Rule 6(e), Fed. R. Crim. P., for production of the grand jury minutes, charging that the indicting grand jury had not heard witnesses, but had actu-

ally only been "briefed" by government agents concerning evidence which had been presented to an earlier grand jury in the Western District of Pennsylvania. Following denial of this motion Klein requested the district court to conduct an *in camera* examination of the Kentucky grand jury transcript. Seeking to distinguish *Costello* v. *United States,* 350 U. S. 359 (1956), and this court's decision in *United States* v. *Hoffa,* 349 F. 2d 20 (1965), *aff'd,* 385 U. S. 293 (1966), he argues that it is his contention that there was no evidence presented to the indicting grand jury, not that the evidence presented to the grand jury was hearsay or otherwise incompetent. He concedes that a motion under Rule 6(e) is addressed to the sound discretion of the trial judge, but maintains that there was an abuse of discretion in denying the motion in this case.

The Court of Appeals for the Second Circuit reversed a conviction and dismissed an indictment where a witness before a grand jury testified extensively about a drug transaction and the grand jury was not informed that the testimony was based on hearsay and was misled to believe that the witness was testifying from personal knowledge. *United States* v. *Estepa,* 471 F. 2d 1132 (2d Cir. 1972). Thereafter the Second Circuit held that when it appears that a grand jury had heard only hearsay testimony, on motion, the district judge should examine the grand jury minutes *in camera. United States* v. *Ramirez,* 482 F. 2d 807 (2d Cir.), *cert. denied sub nom. Gomez* v. *United States,* 414 U. S. 1070 (1973). Both *Estepa* and *Ramirez* were addressed to a practice of the United States Attorney's Office for the Southern District of New York from which the court concluded that grand juries were being misled by the use of hearsay witnesses rather than eyewitnesses and that in some cases there was a high probability that the grand juries would not have returned indictments if eyewitness

testimony had been presented. It is not contended that such a situation existed in the present case.

The requirement of Rule 6(e) is that the defendant must make "a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." In the absence of such a showing, the proceedings of a grand jury are required to be kept secret. *United States* v. *Wilkinson*, 513 F. 2d 227 (7th Cir. 1975); *Truchinski* v. *United States*, 393 F. 2d 627 (8th Cir.), *cert. denied*, 393 U. S. 831 (1968).

In his motion before the district court counsel for the defendant Klein stated that it was his "undertanding" that the grand jury which had returned the indictment was not the grand jury which had heard the witnesses in the case. This was a mere conclusion of the defendant without any factual support. Actually the chief witness for the government testified twice at the trial that he had appeared before the grand jury in Louisville. We conclude that the defendant made no showing of the existence of grounds for a motion to dismiss the indictment and that the district court did not abuse its discretion in denying the motion. *United States* v. *Barnes*, 313 F. 2d 325, 326 (6th Cir. 1963).

Klein next contends that count one (conspiracy) and count three (interstate travel for the purpose of committing arson) of the indictment charged him with identical offenses and that the counts therefore merged, precluding separate punishment on the two counts. Count three charged that Klein caused travel in interstate commerce by one of the actual arsonists and he maintains that this is precisely the same as one of the overt acts with which he is charged under count one. The government argues that Klein's contention is undercut by the settled principle that a person may be convicted both of a substantive offense and a conspiracy to commit the same substantive offense.

The test for determining if an indictment charges one offense or separate offenses was established by the Supreme Court in *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932). In *Iannelli* v. *United States*, 420 U. S. 770, 785 (1975), the Court pointed out that there may be a "substantial overlap" in the proof offered to support two charges but that the *Blockburger* test is satisfied so long as "each requires proof of a fact that the other does not. . . ." In *United States* v. *Austin*, 529 F. 2d 559 (6th Cir. 1976), the indictment was drawn in such a way that the substantive offenses "in effect charged the same agreement or concert of action . . ." involving the defendant and other persons as was charged in the conspiracy count. Under these circumstances we held that there was a merger of offenses. The indictment in the present case is not drawn in the same way as the indictment which the court considered in *Austin*.

Of course the essence of a conspiracy is an agreement to commit an offense. A conviction under count one required proof of an agreement. Count three, on the other hand, charged interstate travel and causing interstate travel by the arsonist. The fact that the offenses charged in the substantive counts all related to a single event which was the ultimate purpose of the conspiracy is immaterial. The substantive offenses do not require an agreement whereas the conspiracy does. There may be conviction and punishment both for a conspiracy and for aiding and abetting in commission of a substantive offense so long as the "separate offense" test of *Blockburger* is met. *Pereira* v. *United States*, 347 U. S. 1 (1954). Essentially the same arguments as those made by Klein in this case were considered by the court in *United States* v. *Bradley*, 421 F. 2d 924, 927-28 (6th Cir. 1970), where the court stated:

> The commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes,

and a plea of double jeopardy does not arise on a conviction for both. Pinkerton v. United States, 328 U. S. 640, 643, 644, 66 S. Ct. 1180, 90 L. Ed. 1489; Pereira v. United States, 347 U. S. 1, 11, 74 S. Ct. 358, 98 L. Ed. 435 (1953); Callanan v. United States, 364 U. S. 587, 590, 81 S. Ct. 321, 5 L. Ed. 2d 312 (1960). Neither does a conviction for a substantive offense in any way merge a conspiracy charge into the substantive crime. Callanan v. United States, *supra,* 364 U. S. at 587, 81 S. Ct. 321. In *Pereira, supra,* 347 U. S., at 11, 74 S. Ct. 358, the Court specifically held that aiding and abetting, under the facts of that case, was a separate crime from conspiring. We can find no meaningful distinction in the facts presented here.

The other issues raised by Klein do not require extended treatment. He contends that it was an abuse of discretion for the district court to exclude evidence that he had submitted to a polygraph test and that Hartford had relied upon it in settling his insurance claim. This court has recently reiterated its position that the result of a polygraph test is not competent evidence. *United States* v. *Mayes,* 512 F. 2d 637 (6th Cir.), *cert. denied,* 422 U. S. 1008 (1975) and *sub nom. Cook* v. *United States,* 423 U. S. 840 (1975). Since polygraph evidence itself would have been incompetent, there was no abuse of discretion in excluding testimony that a polygraph test had been taken. Klein contends further that the district court committed prejudicial error in admitting testimony that the occupation of Merrill Klein (no relation to appellant) was that of "arsonist." His argument on this point seems basically concerned with the fact that the District Judge ruled similar evidence inadmissible at an earlier stage of the proceedings. However, at the time the evidence was admitted there had been a great deal of testimony concerning arson and the

identification of Merrill Klein as an arsonist was clearly relevant. Appellant Klein also contends that the district court erred in admitting a letter in evidence which had been written by a government witness to himself setting forth the details of the conspiracy. *United States* v. *Walsh,* 305 F. 2d 821 (6th Cir.), *cert. denied,* 371 U. S. 876 (1962), cited by Klein is inapposite. The decision to admit or exclude evidence is within the discretion of the trial judge and we perceive no abuse of discretion in the rulings complained of.

Appeal of James E. Fife (No. 76-1366)

Appellant Fife argues that he was prejudiced by the fact that a co-defendant, Ivan Marra, pled guilty during the trial and that the court advised the jury of this occurrence. Upon first receiving the guilty plea of Marra the court merely advised the jury that something had transpired which made it no longer necessary for Marra and his counsel to be present and that he was no longer involved in the case. Thereafter, counsel for appellant Klein requested the court to instruct the jury of the reason for Marra's withdrawal. Counsel for Fife objected and moved for a mistrial when the court announced that the jury would be informed and instructed that no inferences could be drawn from Marra's guilty plea in their consideration of the charges against Klein and Fife. The court did then advise the jury of Marra's guilty plea and gave a comprehensive instruction that the jury should draw no inferences with respect to the case against the remaining defendants and that the guilty plea would in no way influence them in the decision which they would be required to make with respect to the other two defendants.

Fife relies primarily upon *Payton* v. *United States,* 222 F. 2d 794 (D.C. Cir. 1955), in which it was held prejudicial error for the court to receive a guilty plea in the presence

of the jury and then emphasize this fact as the trial proceeded. The court of appeals pointed out that it was particularly prejudicial because the evidence showed a close association between the co-defendant who had pled guilty and the defendant whose trial continued. So far as may be ascertained from reading the reported decision, the trial court in *Payton* did not give a corrective instruction to the jury as was done in the present case. In *United States* v. *Kimbrew*, 380 F. 2d 538 (6th Cir. 1967), the court held that it was not error to permit a co-defendant to change his plea from not guilty to guilty in the presence of the jury, though the reviewing court must be sensitive to any aggravating circumstances. In *Kimbrew* there was no request for a corrective instruction and the conviction was affirmed.

Fife argues that there were aggravating circumstances in the present case in that testimony had linked Marra and Fife as business associates and they had been described as being together about one week before the fire. On the other hand, we do not have the aggravating circumstance found in *Payton* of several references by the court to the guilty plea without instructing the jury that it was not to draw any inferences from this development. We believe the Fifth Circuit articulated the proper test in *United States* v. *Baete*, 414 F. 2d 782, 783 (1969), where it stated that in cases such as this the appellate court should focus its attention carefully on "the sufficiency of the corrective instruction." This test is particularly applicable in the present case where one of the remaining codefendants requested the court to advise the jury of the guilty plea and the other objected. We have carefully examined the corrective instruction given by District Judge Bratcher and conclude that it was sufficient to remove any prejudice which might otherwise have flowed from the jury's knowledge of Marra's guilty plea.

Prior to trial, appellant Fife made a motion pursuant to Rule 16(c), Fed. R. Crim. P., for production of all

documents and other tangible items in the possession, custody or control of the government which might be material to the preparation of the defense. This motion was granted, but the documents disclosed to the defendants did not include a bank signature card with reference to a deposit in a Cleveland, Ohio bank in the name of Marra Industries. An officer of the Cleveland bank appeared pursuant to a government subpoena and brought with him bank deposit statements and a signature card for the account of Marra Industries bearing the signatures of Ivan Marra and the appellant Fife. Fife objected to production of the signature card on the ground that the government had not produced it in compliance with the order under Rule 16. The court excluded the signature card at that time. When the witness was recalled later, the court permitted the signature card to be received in evidence. At this time the attorney for the government pointed out that copies of the card had been made available to the defense two days earlier.

Fife argues that so long as the bank official was only permitted to testify that the account has been opened the jury did not know that he, Fife, had any connection with the bank account, and that it was prejudicial to reveal this fact through admission of the signature card which had not been furnished prior to trial. We fail to see prejudice in the ruling of the trial court. Fife never denied that he was associated with Marra, but insisted that he made an investment in Marra Industries thinking that it was a legitimate business enterprise. Furthermore, there was direct evidence of Fife's association with Marra in addition to the fact that both had signed the signature card. There was no reversible error in the district court's handling of this matter.

Fife contends that his Sixth Amendment right to confront witnesses against him was infringed by the limita-

tions which the district court placed on his cross-examination of the government witness, Joseph Laverich. Laverich was the only witness who implicated Fife in the burning of the bakery building, and Fife denied any involvement. Thus the jury had to make a credibility determination with respect to conflicting testimony of Fife and Laverich. *Cf. Smith* v. *Illinois,* 390 U. S. 129, 131 (1968). Fife argues that his cross-examination of Laverich was improperly restricted in two respects.

At the beginning of the trial, counsel for Fife requested an FBI "rap sheet" on Laverich. The government attorneys reported to Fife's counsel that it had been learned through a telephone call to Washington that the FBI did not have a rap sheet on the witness. Defense counsel was informed that the witness had two misdemeanor convictions, but no felony convictions. Near the end of cross-examination of Laverich by counsel for Fife one of the prosecuting attorneys informed counsel and the court that a second telephone call to Washington had produced the fact that a rap sheet on Laverich was in existence. The government attorney had a handwritten copy of the contents of the rap sheet and this was shown to the District Judge and Laverich in chambers. Counsel for Fife was permitted to ask Laverich about each item on the handwritten sheet out of the presence of the jury. Laverich stated that he had not been convicted of a felony within ten years of the time of trial and that he was found innocent by a jury of a charge of attempted murder which was shown on the handwritten sheet. Counsel for Fife did not cross-examine Laverich further in the presence of the jury.

Prior to the above proceedings counsel for Fife had attempted to cross-examine Laverich extensively about the attempted murder charge upon which he had been acquitted. The district court sustained objections to such questions and counsel stated that he believed the Department of

Justice Strike Force attorneys had assisted Laverich in winning an acquittal in the attempted murder case in order to induce him to testify against Fife in the present case. Counsel admitted that he had no information to this effect, but wanted to attempt to develop this theory. The district court permitted Fife's attorney to introduce a memorandum of understanding between Laverich and the prosecuting attorneys and required Laverich to read this memorandum to the jury. Laverich testified that he received immunity and was not named as a defendant in the case against Klein, Marra and Fife.

Fife was not prejudiced by the delay of the government in producing the "rap sheet." Furthermore, the District Judge did not abuse his discretion in sustaining objections to questions concerning a charge on which Fife had been acquitted by a jury. This case is totally unlike *Giglio* v. *United States,* 405 U. S. 150 (1972), where the prosecution failed to disclose to the jury the fact that the government had made a promise of leniency in return for the testimony of a key witness. The jury was fully informed as to arrangements between Laverich and the government, and Fife's attorney was free to argue inferences from the known facts. However, counsel for Fife was not entitled to harass the witness with questions about a serious charge upon which a jury had acquitted him, based on counsel's personal theory of an illegal agreement between the government and Laverich which is totally unsupported by the record.

The second, and more serious charge of prejudicial limitation of cross-examination relates to the residence address of Laverich. On direct examination Laverich testified that he lived in a residence in Greensburg, Pennsylvania and had lived there for two years at the time of the trial. The prosecuting attorney objected when counsel for Fife on cross-examination asked the residence address of Laverich in Greensburg, Pennsylvania, and the court sustained

the objection. Immediately thereafter there was a bench conference at which counsel for Fife said that he needed the information to develop his cross-examination and for further investigation of Laverich. The government attorney stated, "This witness is apprehensive to tell it." The district court stated that he did not want to contribute to the apprehension of the witness and that the name of the town where Laverich resided should be sufficient for cross-examination and investigation.

Counsel for Fife then conducted a detailed cross-examination during which Laverich testified that he was not in custody at the time of the trial, that he had participated in the burning of a hotel in Pennsylvania in 1968 or 1969 and in another arson case in Pittsburgh after the fire in Louisville. Furthermore, he testified that he had "burglarized places." He testified that he was employed at the time of the trial as a building contractor in Greensburg, Pennsylvania and that he had previously done work in electronics. During the conference between the court and counsel after the "rap sheet" information was produced, Laverich stated under oath that the population of Greensburg, Pennsylvania is about 15,000.

Fife relies principally on *Alford* v. *United States*, 282 U. S. 687 (1931), and *Smith* v. *Illinois*, 390 U. S. 129 (1968). *Alford* establishes the rule that counsel for a defendant is not required to show, or even know, what he expects to prove on cross-examination. Cross-examination, particularly where the purpose is to disclose bias or prejudice on the part of a witness, is necessarily of an exploratory nature. The Supreme Court held that it was error for a trial court to sustain an objection to a cross-examiner's question seeking to elicit the address of a government witness in a criminal prosecution. Mr. Justice Stone wrote for the Court, "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put

the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise him." 282 U. S. at 692.

In *Smith* v. *Illinois*, 390 U. S. 129 (1968), a government witness admitted on cross-examination that he had given a fictitious name on direct examination. The trial court sustained objections to cross-examination questions concerning his real name and his residence address at the time of the trial. Pointing out that the identity and residence of a witness are basic information the Court stated, "The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id.* at 131. The present case is distinguishable in some respects from *Smith* v. *Illinois* in that the witness gave his true name, the town where he lived and worked and his occupation.

The mere expression of apprehension by a witness who is reluctant to divulge his address is not sufficient justification for restricting cross-examination without further inquiry. An *in camera* hearing might be held to determine if there is a factual basis for such apprehension. The district court should have conducted such an inquiry in the present case. However, information which was brought out in the otherwise unrestricted cross-examination of Laverich revealed that he had lived in a town of approximately 15,000 population for a period of at least two years where he was engaged as a self-employed building contractor. Thus the only information the witness was allowed to withhold was his street address in a relatively small community.

Though convictions were reversed by the Supreme Court both in *Alford* v. *United States* and *Smith* v. *Illinois*, the Court did not lay down a *per se* rule that a witness must

always be required to give his residence address. In *Alford* the Court affirmed that the extent of cross-examination with respect to any permitted subject is always within the sound discretion of the trial court. 282 U. S. at 694. We believe that under the circumstances of this case, counsel for Fife had the opportunity "to place the witness in his proper setting. . . ." *Id.* at 692. As the court pointed out in *United States* v. *Alston*, 460 F. 2d 48, 51 (5th Cir.), *cert. denied*, 409 U. S. 871 (1972), the purpose of *Alford* and *Smith* is achieved if sufficient evidence is admitted to identify the witness and locate him in his usual environment. The cross-examination which was permitted in the present case produced this information.

The critical importance of cross-examination in our adversary system of justice has been affirmed many times. The necessity of permitting great latitude in cross-examination where the purpose is to show bias or motive of a witness to testify falsely has been recently reiterated by the Supreme Court and this court. *See Davis* v. *Alaska*, 415 U. S. 308 (1974); *United States* v. *Garrett*, ____ F. 2d ____ (6th Cir. No. 76-1108, decided September 29, 1976); *United States* v. *Baker*, 494 F. 2d 1262 (6th Cir. 1974). However, an examination of the entire transcript of the testimony of Laverich reveals an extensive and productive cross-examination, and we conclude that the district court did not commit prejudicial error.

Both judgments of conviction are affirmed.

APPENDIX B

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18 U.S.C., 1952

Interstate in foreign travel or transportation in aid of racketeering enterprises.

A. Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to:

1) distribute the proceeds of any unlawful activity or;

2) commit any crime of violence and to further any unlawful activity or;

3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs 1, 2 and 3, shall be fined not more than $10,000 or imprisoned for not more than five (5) years, or both.

B. As used in this section, unlawful activity means:

1) any business enterprise involving gambling, liquor on which the federal excise tax has not been paid, narcotics, or controlled substances (as defined in Section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the state in which they are committed or the United States or;

2) extortion, bribery or arson in violation of the laws of the state in which committed or of the United States.

C. Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C., 1341

Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fradulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimidated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service, or takes or receives therefrom, any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five (5) years, or both.

18 U.S.C., 371

Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five (5) years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C., 2

Principals.

A. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commissions, is punishable as a principal.

B. Whoever willfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal.